In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1326

INDIANA HARBOR BELT RAILROAD COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. B, pp. 4a-12a) is reported at 368 F. Supp. 904. The opinion of the court of appeals (Pet. App. C, pp. 13a-24a) is reported at 510 F. 2d 644.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1975. The petition for a writ of certiorari was filed April 21, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly held that the district court erred in considering the lawfulness of certain railroad tariffs in reviewing the Interstate Commerce Commission's order finding such tariffs inapplicable.

2. Whether the court of appeals correctly determined that the district court erred in disregarding the Interstate Commerce Commission's findings on the inapplicability of the tariffs when the district court ruled that "good judgment" could favor the Commission's position.

STATEMENT

Petitioner initiated this case by bringing separate lawsuits against General American Transportation Corporation and North American Car Corporation in the United States District Court for the Northern District of Illinois. Petitioner sought to collect charges allegedly due for the movement of empty, privately owned, tank cars to and from the defendants' repair facilities, which were located on petitioner's switching line. The defendants denied liability and filed counterclaims against petitioner for refund of similar charges collected by petitioner for switching privately owned freight cars to and from their repair shops. The district court stayed the actions pending an administrative determination by the Interstate Commerce Commission whether the charges in question were in fact due under the applicable tariffs and if so, whether they were just and reasonable under the Interstate Commerce Act, 49 U.S.C. 1, *et seq.*

A Commission hearing examiner issued a report and recommended order concluding (1) that petitioner's charges were due under the applicable tariffs and (2) that the charges were not shown to be unjust or unreasonable (Pet. App. D, pp. 25a-45a). On exceptions, however, the Commission's Division 2 reversed the examiner, determining that under the applicable tariffs no charges were due for the movements of cars to and from defendants' repair facilities (Pet. App. E, pp. 46a-55a; 341 I.C.C. 57).

The Commission's decision was based upon its interpretation of four technical tariff provisions. For the period involved, movements of privately owned freight cars were generally governed by Agent B. B. Maurer's Mileage Allowance Tariff 7, I.C.C. No. H-32 (the "Mileage Tariff") (Pet. App. A, pp. 1a-3a).[1] Pursuant to the so-called "equalization rule" of this tariff, the railroads paid a mileage allowance on both empty and loaded miles to the car owner, and the car owner, in turn, paid to the railroad charges based on the number of empty miles not "equalized" by loaded miles, but empty cars considered as "instrumentalities of transportation" (*e.g.*, tank cars moving to and from repair shops) were moved without charge. As stated in Item 120 (Pet. App. A, p. 2a) of the Mileage Tariff:

> Except as otherwise provided in Items 25 and 30 (Application and Exceptions to Application), tank cars will be moved empty without charge at the time movement is made between stations or junction points on the line of railroads parties to this tariff * * *.

Item 25 (Pet. App. A, p. 1a), in turn, provided:

> Except as otherwise provided herein, these rules govern the payment of mileage allowances and equalization of mileage on tank cars when used by railroads, parties to this tariff, individually (or jointly where specifically provided herein), for transportation over their lines, including the movement to shops for repairs or reconditioning or returning therefrom * * *.

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[1]The Mileage Tariff was cancelled and superseded on January 1, 1971.

Item 30 (Pet. App. A, p. 2a) provided:

> The rules and mileage allowances published herein, will not apply on the following: (a) Movements of empty cars for which charges are assessed under tariff authority. * * *[2]

Before the Commission, petitioner maintained that its own switching charges, published in tariff IHB No. 325-U, I.C.C. No. 1160 ("Tariff 325-U") (Pet. App. A, p. 1a), came under the exceptions clause of Item 30 of the Mileage Tariff, which relieved it of its obligations under Items 120 and 25 of the Mileage Tariff. Petitioner's theory was that this result was accomplished by the provision of Tariff 325-U that stated charges for "Railway Equipment on own wheels, *viz.*: Empty Freight Cars." Citing the rule that the more specific designation applies whenever a commodity shipped is included in more than one tariff designation, the Commission found that petitioner's charge in Tariff 325-U was not contemplated by Item 30 of the Mileage Tariff because that Item was not specific enough to overrule the far more precise language of Item 25 (Pet. App. E, pp. 54a-55a). To hold otherwise, the Commission noted, would be to accept the "anomalous result of a vague and ambiguous exceptions provision countermanding and taking precedence over a more exact tariff rule" (Pet. App. E, p. 54a). The Commission reasoned that since Tariff 325-U speaks in terms of empty freight cars generally, the result of petitioner's interpretation of the various tariff provisions would be to cancel the basic mileage allowance provision of the Mileage Tariff as regards *all* empty cars, thus largely nullifying the Mileage Tariff (Pet. App. E, p. 55a). Accordingly, the Commission con-

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[2]Provisions similar to Items 120, 25, and 30 applied to other types of freight cars.

cluded that since there was no tariff rate available under Item 30 which would give effect to the exception, Item 25 governed; and since the Commission determined that the charge petitioner sought to have applied under Tariff 325-U was inapplicable, it declined to rule on whether that charge was otherwise lawful (Pet. App. E, p. 55a).

After the Commission's final decision, petitioner filed an action in the district court against the United States and the Interstate Commerce Commission, requesting that the Commission's order be set aside.[3] The district court consolidated the three suits and decided them in petitioner's favor (Pet. App. B, pp. 4a-12a; 368 F. Supp. 904). The district court, although recognizing that "good judgment could favor either contestant" (Pet. App. B, p. 8a), nevertheless ruled in favor of petitioner on the theory that "the conclusions reached by Division 2 precipitate a violation of Sec. 2 of the Act" (Pet. App. B, p. 11a) and are "otherwise unsound in respect to implementing the declared policy of the Interstate Commerce Act * * *" (Pet. App. B, p. 12a).

The court of appeals reversed (Pet. App. C, pp. 13a-24a; 510 F.2d 644), holding that "the district court in reaching its decision took into consideration matters not properly before it and that on the issue which was properly before it, the validity of the interpretation by the Commission of the tariffs involved, the court erred" (Pet. App. C, p. 21a). In particular, the court held that the lower court was without power to consider *ab initio* the question whether the application of the tariffs as interpreted by the Com-

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[3]Review was before a single-judge district court rather than a three-judge court, for the case involved a question of reparations (*United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 443) and was initially brought to the Commission by a referral of issues from the district court. 28 U.S.C. 1336(b); *Keller Industries, Inc.* v. *United States*, 449 F.2d 163, 166-167 (C.A. 5).

mission would result in a violation of Section 2, since this was a matter within the Commission's primary jurisdiction (Pet. App. C, pp. 21a-22a). The court further held that the interpretation of the tariffs was "peculiarly within the competence of the Commission to determine," and that the Commission's construction was consistent with the language of the tariffs as well as "all the customs, practices and other underlying facts involved" (Pet. App. C, p. 23a). Finally, the court rejected petitioner's contention that the Commission's decision forced petitioner to perform a service that resulted in the taking of its property without just compensation in violation of the Fifth Amendment of the Constitution, since "[petitioner] did not make the showing as to its over-all operations which was necessary to enable the court to consider such a claim" (Pet. App. C, p. 24a).

ARGUMENT

The decision of the court of appeals is in accord with settled principles of law and does not warrant review by this Court. In reviewing the decision of the district court, the court of appeals essentially reached two conclusions: (1) the district court had improperly considered matters which were not before it, such as the alleged violation of Section 2 of the Act caused by the Commission's construction of the tariffs; and (2) the district court incorrectly construed the applicable tariff provisions. Those conclusions are correct.

1. Matters relating to the lawfulness of rates under the Interstate Commerce Act, such as issues of discrimination under Section 2, are committed to the primary jurisdiction of the Commission. *United States* v. *Wabash R. Co.*, 321 U.S. 403, 413; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291. Thus, as the court of appeals stated, "the courts must enforce a rate, even though

alleged to be discriminatory, until the matter of discrimination has first been decided by the Commission" (Pet. App. C, p. 22a). See *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439-440. If petitioner desires to challenge the reasonableness of the charges prescribed by its tariffs, as construed by the Commission, its proper recourse is to file a complaint with the Commission under Section 13 of the Act, 49 U.S.C. 13, alleging a violation of Section 2. The Commission's decision in that complaint proceeding would, of course, be subject to judicial review.

2. As to the construction of the tariffs in question, the court of appeals correctly recognized (Pet. App. C, p. 23a) that "the reconciliation of these conflicting tariffs and the proper scope of each in view of the other was a matter peculiarly within the competence of the Commission * * *." See *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 65-66, 68. Here, as the court of appeals stated, the Commission considered the language of the respective tariffs, the applicable rules of construction of tariffs, the past treatment of the terms involved in the usages of the trade, its own past decisions, and other factors (Pet. App. C, pp. 23a-24a; Pet. App. E, pp. 54a-55a); the Commission's conclusion that Tariff 325-U was inapplicable was properly accorded great weight by the court of appeals.[4]

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[4]Petitioner attempts to show that the court of appeals erroneously declined to look at the evidence underlying the Commission's decision and that, had it done so, it would have seen that the Commission was unlawfully forcing petitioner to render "free" transportation (Pet. 9-10). That contention is without merit. The court of appeals found it unnecessary to review "in any detail" the record or the report of the Commission because of the conclusion of the district court that, on the basis of the record in the case, "good judgment could favor either view of the impact of the tariffs upon each other" (Pet. App. C, p. 23a). As the court of appeals correctly concluded, in view of the limited scope of review of the Commission's findings on technical questions of tariff interpretation, this finding by the district court compelled affirmance of the Commission's interpretation.

Moreover, petitioner never provided "free" transportation of cars moving to and from repair shops. Under the Mileage Tariff, petitioner

Finally, contrary to petitioner's contention (Pet. 10-11), there is no constitutional issue presented here with regard to the taking of petitioner's property without just compensation. This Court in *Baltimore & Ohio R. Co.* v. *United States*, 345 U.S. 146, 148-150, determined that a regulatory system cannot be held to have taken a carrier's property without just compensation unless the carrier has shown that it is unable to receive just compensation for its overall services to the public. No such showing was made by petitioner here.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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is compensated for the miles it must haul empty cars which are in excess of the number of miles it hauls loaded cars. In addition, the costs borne by petitioner for providing this service are included as part of total costs in setting rates for the transportation of freight. In any event, even if petitioner were performing "free" transportation—which is not the case—it still has no authority to collect a charge not covered by an applicable tariff. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co., supra,* 204 U.S. at 439.